CONSTITUTIONAL COURT OF SOUTH AFRICA

Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy

Lecture delivered by Justice Sisi Khampepe
at the Stellenbosch University Annual Human Rights Lecture
Thursday, 6 October 2016

---

[1] The Dean and Faculty members of the University of Stellenbosch Law School, other members of the University of Stellenbosch community, students, members of the judiciary present, ladies and gentleman: good evening. It is an honour and a privilege to be with you on this auspicious occasion.

[2] Lena, yinkulumo yami ekumele ngiyichaze kimi ngolimi lwesiNgisi. "This is an obligation: I must address myself to you in English."[1]

[3] So begins a now celebrated address by French philosopher Jacques Derrida entitled "The Force of Law".[2]

[4] As in my case this evening, Mr Derrida delivered his lecture in a language that was not his own. During the speech, he queried what was lost in translation. And in doing so, his speech took on the formidable task of reflecting on what makes a just society "possible".[3] Mr Derrida considered why it was just that he, as a native French speaker, must address his

[1] Derrida "Force of Law: 'The Mystical Foundation of Authority'" in Cornell, Rosenfeld and Gray Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge, London 1992) at 3.
[2] Id.
[3] Id.

American audience in English. And on this ponderance, he conceived justice as fidelity to otherness.[4] I invite you to consider that proposition during the course of my speech tonight.

[5] Like me, Mr Derrida was acutely aware that the obligation to give his speech in English arose out of circumstances beyond his control: he needed to do justice to his audience, and the language in which his discussion occurred took on a force of law.

[6] The intersection of language, law and justice is, of course, familiar terrain at this august institution. I do not pretend to be an expert. As my 16-year old daughter will tell you when I try to use my mobile phone, I am not an expert at very much!

[7] Through the course of this evening, I hope nevertheless to challenge all of you to engage with the language debate in a manner that fits with the Constitutional vision. Language is an intrinsic part of law; without it law cannot be communicated, recorded or performed. How, we deal with existential attacks against our language matters as much as the attacks themselves.

[8] The title I have chosen for this esteemed Annual Human Rights Law Lecture is "Meaningful Participation as Transformative Process: The Challenges of Institutional Change in South Africa's Constitutional Democracy." Quite a mouthful!

[9] Like Mr Derrida did in his speech,[5] I will start my discussion with the smallest word I can find: namely the "as" that connects "meaningful participation" and "transformative process". Sometimes the hidden components of a language tell the biggest story.

[10] When put together, the common letters "a" and "s" turn into a slippery character. The function of the word "as" can be to compare, like in the statement: "Stellenbosch is as beautiful as any town in the world". Or, to conjunct, as with: "Stellenbosch is beautiful, as we all know". It can also present examples: "Jan Smuts, Hertzog, Malan, Strijdom, Verwoerd and Vorster as Stellenbosch alumni", and signal equivalence: "Stellenbosch as the alma mater of Beyers Naude, Johan Froneman or Edwin Cameron".

[4] Derrida considered that justice is infinite because it is irreducible and owed to the other; it "always addresses itself to singularity, to the singularity of the other: Id at 20, 25.
[5] Above n 1 at 3.

[11] What yokes these functions together is that they are all terms of close relation. The word "as" connects, associates and unites. It brings history, purpose and context into a sentence, asserting a bond between the concepts it sits "between or amongst".

[12] The idea of "sitting between or amongst" is not foreign to those who live in South Africa. Ours is a negotiated nation. The legacy of colonialism and Apartheid was one of division and separateness: our new Constitutional democracy "is different";[6] we live with one another by choice and by obligation of law. Our past is now common, whether we like it or not.

[13] When I speak of meaningful participation as transformative process, I therefore mean it in this relational sense. I am suggesting to you that the two concepts are intimately associated. In my view, transformation is a vessel of empty rhetoric without meaningful participation. Similarly, meaningful participation is necessarily a transformative process.

[14] Tonight, I want to take the opportunity to explore this relationship further.

[15] First, against the backdrop of the teachings of various luminaries of our time, I will explain what transformative process means to me.

[16] Second, I will trace how I have come to understand meaningful participation through my judicial experience. I specifically lean on three topics that are dear to me. These being: housing, the legislative process, and in particular, education, which is currently front and centre of the public discourse.

[17] So, what then, do I mean by transformative process? More specifically, what meaning do these words take on within the history and context of our Constitution?

[18] Fortunately, two of my colleagues, the late former Chief Justice Pius Langa and the recently retired Deputy Chief Justice Dikgang Moseneke have sailed these turbulent waters before. Chief Justice Langa, speaking at this university, likely in this very hall encapsulated "the core idea of transformative constitutionalism" as a call to nonconformity. He simply said: "we must change".[7]

[19] But change why and change how?

---

[6] Judgement of Mahomed J in *S v Makwanyane* 1995 (3) SA 391 at para 261.
[7] Langa "Transformative Constitutionalism" (Prestige Lecture delivered at the University of Stellenbosch, 9 October 2006) at 2.

[20] The "why" is clear based on our shared history. In an earlier lecture on "Transformative Adjudication", the Deputy Chief Justice Moseneke drew on the life of Bram Fischer, one of this country's great legal luminaries, to reveal the beating heart of transformative constitutionalism.[8] He poignantly illustrated the devastasting deficiencies of Apartheid through the contours of Bram's life and explained why our society must change. This biographical approach is authoritative because it reaches beyond the broad strokes of antiquity into the lived experience of our fissured past. It weaves the soul of human narrative into our collective memory.

[21] To give voice to the oppressed is to celebrate difference and uniqueness. It is to recognise the complex interplay of culture, experience and memory that defines us all individually. Meaningful participation breaks beyond the limits of the law to tend to the complexities of each person and problem.

[22] Nevertheless, as Professor Pierre de Vos reminds us, historical narratives are inherently subjective.[9] Transformation should not be purely a response to the historical wrongs in vogue at any given time. Instead, a transformed society is one that allows for dialogic views; transformative processes are those that build space for dialogue and constructive contestation.

[23] What do these terms, these linguistic constructs, mean in our constitutional context?

[24] Chief Justice Langa explains that, "Transformation is a permanent ideal, a way of looking at the world that creates a space in which dialogue and contestation are truly possible".[10] Our Constitution is not temporarily transformative – it must always be transformative. It is an inexhaustible obligation to question existing conventions, institutions and paradigms.

[25] The Interim Constitution, describes South African constitutionalism as "a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold

[8] Moseneke "The Fourth Bram Fisher Memorial Lecture – Transformative Adjudication" (2002) 18 *SAJHR* 309.
[9] De Vos "A Bridge too Far? History as context in the interpretation of the South African Constitution" (2001) 17 *SAJHR* 1.
[10] Id at n 7 above at 5.

suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence".[11]

[26] The metaphor of the Constitution as a bridge between the lessons of our past and the aspirations of our future is by now a familiar one; thanks largely to the late Etienne Murenik's seminal article "A Bridge to Where?". In it, Professor Murenik describes South Africa's pre-constitutional dispensation as typified by a "culture of authority".[12] This is a powerful idea, increasingly lost in the hocus pocus of everyday politics. Our Constitution abhors an "ethic of obedience". The transformative process to which I refer in the title of my lecture is resistance to this docility. The Constitution requires that we continually remake our society through continuous dialogue.

[27] Transformation is therefore not about cosmetics. It is more than words or ruminations, though these play a part. It offers the opportunity to recast past wrongs. Transformation is about instilling a culture of justification and experimentation, an insatiable ethical appeal to do better and be better. To use the words of my host, Professor Liebenberg, transformation must build "capacities to pursue deeper reforms".[13]

[28] As Professor Liebenberg potently points out, the transformative potential of what she calls a "participatory frame" for law and politics can easily slip into "empty proceduralism".[14] She makes clear that it is essential that the language of participation is not used to entrench the interests of "better resourced public and private institutions".[15]

[29] Of course, black women such as myself must be given preferential access to the opportunities that were previously denied to us. This is because a culture of justification demands it. Derrida explains how the phrase "we, men" impliedly represented, "we adult white male Europeans, carnivorous and capable of sacrifice."[16] Maintaining a status quo where these men continue to expect obedience from the majority of the country is not transformative because it perversely ignores both reason, and the views of the people. This has little to do with the fact that I am physically black or a woman.

---

[11] Constitution of the Republic of South Africa Act 200 of 1993 (Interim Constitution).
[12] Murenik "A Bridge to Where? Introducing the Interim Bill of Rights" 10 *SAJHR* 21 at 32.
[13] Liebenberg "Social Rights and Transformation in South Africa: Three Frames" (2015) 3 SAJHR 458.
[14] Id at 468.
[15] Id.
[16] Id at n 1 above at 18.

[30] It is by now mandatory to refer to Karl Klare's "Legal Culture and Transformative Constitutionalism"[17] in any discussion of the law and transformation. I am grateful for Mr Klare's assistance because it allows me to escape the accusation that my understanding of the Constitution can be pigeon-holed as pejoratively "liberal". This is not classic liberalism, which conceived the law as systematised, intellectually-satisfying, and inherently neat.

[31] Mr Klare articulately illustrates that our Constitution, in "sharp contrast" to classical liberal documents such as the United States Constitution, is social, redistributive, caring, positive, horizontal, participatory, multicultural, and self-conscious about its historical setting, and transformative role and mission.[18] A process is transformative if it is sensitive to these values, and builds its understanding of justification on them.

[32] What, then, is meant by "meaningful participation" in our Constitutional dispensation? Happily, I can again stand on the shoulders of giants in hazarding an answer: the Constitutional Court has grappled with this idea on numerous occasions, including during my tenure. Together, we can trace the thread of "meaningful participation" through three types of cases dealt with by the Court. As I mentioned earlier: housing, the legislative process, and education.

[33] Like Theseus in the Minotaur's Labyrinth, I am fortunate to have my own Ariadne in the guise of Professor Stu Woolman. In his wide-reaching and profoundly enlightening *The Selfless Constitution*, he develops the notion of "participatory bubbles".[19] As he explains:

"The Physical metaphor of bubbles is meant to convey three qualities… First, processes of participation and negotiation are a natural part of ongoing social interactions. They originate when challenges to a given institutional authority accumulate and finally come to a boil: just as bubbles form after pressure builds up and escapes to the surface of a liquid. Second, bubbles are meant to suggest limits on the scope of participation. . . Third, bubbles are ephemeral. After satisfactory resolutions emerge from processes of participatory engagement, the raison d'etre for the bubbles may cease to exist. The bubble bursts. Participants can, generally speaking, return to their more routine lives."[20]

---

[17] Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146.
[18] Id at 152-3.
[19] Woolman *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta & Co, Cape Town 2013).
[20] Id at 208.

[34] I am attracted to this understanding of participation because it highlights that participatory processes are institutionally bound, limited in scope and inevitably transient. Even where participation is court-mandated, these bubbles extend beyond the four walls of the courtroom.[21] In most cases, courts are not involved at all. And they need not be.

[35] The purpose of meaningful participation is to engage with disagreement in a manner that allows for resolution, or at least disentanglement. Participatory bubbles facilitate this process. To speak more directly, the dictates of the Constitution now mean that participatory bubbles must facilitate this process. So much is perspicuous from our housing and eviction cases.

[36] The emergence of meaningful participation as a constitutional norm came slowly. *Grootboom*,[22] *Kyalami*[23] and *Modderklip*[24] all touched on the importance of meaningful participation or engagement, but did not fully navigate the waters. In *Port Elizabeth Municipality*, my brother Justice Albie Sachs found that parties to a dispute must "engage with each other in a proactive and honest endeavour to find mutually acceptable solutions".[25] But in that case, "too much water had flowed under the bridge", and there was no longer benefit in insisting on meaningful participation or mediation.[26]

[37] I am told it is generally unwise to lean too heavily on a metaphor. But as this is a speech partly on the role language plays in our polity, I hope you will indulge me.

[38] When can it be said that the bridge of participation is no longer "meaningful"? If Professor Mureinik is correct, and our Constitution is transformative because it acts as a bridge from a culture of authority to a culture of justification, can it ever be too late? Is participation not *always* a requisite for justification?

[39] We need not rehash the minutiae of this debate here. It is sufficient to note that meaningful participation and transformative process fill the same allegorical space:

---

[21] Id at 209.
[22] *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 87.
[23] *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) at para 111.
[24] *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC) at para 31.
[25] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at para 39.
[26] Id at para 47.

meaningful participation as transformative process. Mr Derrida's work illustrates that this likely is no linguistic accident.

[40] If you will join me in considering a few cases, we can see how this process has set sail in our jurisprudence.

[41] First, we look to *Olivia Road*.[27] In that case, the Court had to determine whether an order sought by the City of Johannesburg evicting residents of a derelict building was constitutional. In finding it was not, the Court concluded that a municipality which "ejects people from their homes without first meaningfully engaging with them acts in a manner that is broadly at odds with the spirit, purport and purpose of [its] constitutional obligations".[28] My brother Justice Yacoob emphasised that those in need of housing should not be seen as a "disempowered mass".[29] There is an obligation on the state to negotiate with them reasonably and in good faith, taking into consideration their situation and grievances.[30] The Court therefore issued an interim order requiring that the parties meaningfully engage. This participatory bubble resulted in a settlement that was subsequently endorsed by the Court.

[42] Next, we turn to *Joe Slovo*.[31] There, the question of the legality of a planned eviction and relocation of twenty thousand people came before the Court. The Court ordered that the eviction could go ahead, subject to certain conditions, including that an ongoing process of meaningful engagement about various facets of the eviction be carried out. The order, supported by five concurring judgments, has come under criticism for watering-down the requirement of meaningful engagement developed in *Olivia Road*.[32]

[43] This legal debate should not, however, detract from the overarching importance the Court placed on meaningful engagement in facilitating remedy. The reasons for participation may vary from bubble to bubble, and a formalistic analysis of its genesis is not always helpful. The participatory approach adopted by the state in the period leading up to *Joe Slovo*

[27] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
[28] Id at para 16.
[29] Id at para 20.
[30] Id.
[31] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC).
[32] See, for instance, Pillay "Toward effective social and economic rights adjudication: The role of meaningful engagement" (2012) 10 *Intl J Constitutional Law* 732; Liebenberg above n 13; Woolman above n 19.

II,[33] where the order for eviction was revoked, can be directly linked to the Court's reasoning in the earlier *Joe Slovo I*. The processes that the order ignites are really what matter.

[44] Subsequent decisions, including *Blue Moonlight*[34] and *Saratoga Avenue*,[35] have reiterated and expanded upon the requirement for meaningful engagement. In *Schubert Park*, meaningful engagement was linked to human dignity.[36] Certainly we can see that to engage others in a spirit of amity and felicity gives expression to human dignity. In the housing and eviction context at least, facilitating meaningful participation is now a requirement of law.

[45] What does this teach us?

[46] Meaningful participation is forward-looking and empowers individuals to constructively find mutually-beneficial solutions. It is self-determination in action.

[47] The exercise of self-determination leads me to the second thread of case law: those dealing with the legislative process. *LAMOSA*, a decision of the Constitutional Court handed down recently, dealt with the constitutionality of an Act governing land restitution – a smouldering powder-keg in our country as elsewhere.[37] Justice Madlanga, writing for the Court, found that it is "beneath the dignity of those entitled to be allowed to participate in the legislative process to be denied this constitutional right".[38] We are yet to see the wider-ranging effects of this Court's decision, but I am willing to bet that more voices will change in the legislation itself.

[48] Case law on the need for meaningful engagement in the legislation making process is helpful because it makes explicit that participation is an "end to be achieved", and not merely a means to an end.[39] This quote comes from *Doctors for Life*, a ground-breaking case for many reasons. Participation is therefore a process of constant renewal, an inexhaustible obligation to seek justice.

---

[33] *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes* 2011 (7) BCLR 723 (CC).
[34] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).
[35] *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality* 2012 (9) BCLR 951 (CC).
[36] *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) at para. 49.
[37] *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC).
[38] Id at para 58.
[39] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) at para 141.

[49] My brother Justice Ngcobo (as he was at the time) cements meaningful participation as a constitutional cornerstone. In his words, our constitutional democracy "embraces the principle of participation and consultation".[40]

[50] Through this conception of constitutional citizenship, participation provides the chance to contribute to, and create, social, political and civil institutions in a legitimate, democratic manner.

[51] One of these important institutions is schools, which leads me to an issue close to my heart: the rights of children. In particular, the right to education. In an emotional sitting earlier this year in which my brother Deputy Chief Justice Moseneke retired from the Court, he handed down the unanimous decision in *FEDSAS*, a case dealing with the Department of Education's power to interfere with the admission policies of school governing bodies (or SGBs).[41]

[52] As a brief sidebar – given that we are in a university – I imagine that at least some of you are trivia fanatics. For your sake, I will note that this was not Dikgang's last judgment as one might think – that honour goes to the little known decision of *Gbenga-Oluwatoye*; a matter dealing with the legality of settlement agreements in the employment context![42]

[53] Dikgang's extraordinary presence will be missed at the Court. Fortunately, his legacy of steely legal reasoning and unflinching integrity lingers on. I am sure we will only fully appreciate his prolific inheritance in the years to come. I am extremely grateful for our time together on the bench.

[54] But I digress. To use a favourite phrase of Dikgang's, I propose, forthwith, to "stick to my knitting".

[55] The opening paragraph of *FEDSAS* notes that "Education is primordial and integral to the human condition".[43] It is therefore unsurprising that issues of meaningful participation arise within this context. Many of the education cases decided by the Court have dealt with the delicate balance of power between SGBs and the Department of Education. Fundamentally, these disputes revolve around who should get a say in school polices.

[40] Id at para 145.
[41] *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng* 2016 (4) SA 546 (CC).
[42] *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited* [2016] ZACC 33.
[43] Id at n 41 above at 1.

Despite finding for the Department, the *FEDSAS* decision notes that "Parents must be meaningfully engaged in the teaching and learning of their children".[44]

[56] This is no doubt true. Meaningful participation is a process that is not just about politics and law – it has a place in all of our lives. And, of course, schools should be participatory bubbles that involve a range of stake-holders.

[57] *Rivonia Primary School* also dealt with the admission policy adopted by an SGB. Acting Justice Mhlantla (as she was at the time) found that that the Department's Head, exercising an administrative function, acted in a procedurally unfair manner.45 She subsequently noted that—

"in disputes between school governing bodies and national or provincial government, cooperation is the required general norm. Such cooperation is rooted in the shared goal of ensuring that the best interests of learners are furthered and the right to a basic education is realised."[46]

[58] It seems almost too self-evident to point out that cooperation enhances the process and outcome for all. *Rivonia Primary School* links meaningful participation to the right to education and the best interests of the child. This is a powerful statement. From it, we can see just how much our Constitution views participation in decision-making processes as integral, not only for the parties to the dispute, but to society in general. Through the Court's education decisions, we can again see engagement has been elevated to a communal good.

[59] *Welkom High School*,[47] a judgment of my own decided three months before *Rivonia Primary School*, supports Justice Mhlantla's conclusion. This case dealt with the pregnancy policy of a school SGB. I ended my judgment by imploring the parties to engage in consultative processes, should further disputes arise, and ordered meaningful engagement in reviewing the school's policy.[48]

---

[44] Id at para 47.
[45] *MEC for Education in Gauteng Province v Governing Body of Rivonia Primary School* 2013 (6) SA 582 (CC) at para 68.
[46] Id at para 69.
[47] *Head of Department, Department of Education, Free State Province v Welkom High School* 2014 (2) SA 228 (CC).
[48] Id at paras 125-6.

[60] In a helpful concurring judgment, my brothers Justice Froneman and the late Justice Skweyiya stressed that "there is a constitutional obligation on the partners in education to engage in good faith with one another on matters of education before turning to courts".[49] This broadening of the participatory bubble is essential to its success. The Constitution implores us all to meaningfully engage so as to find mutually-satisfactory resolutions to disagreement.

[61] The approach I took in ordering meaningful engagement built on the decision of my sister Justice Nkabinde in *Juma Musjid Primary School*.[50] That case dealt with the eviction of a public school built on private property. The Court ordered that the MEC, the Trustees of the Trust that owned the land, and the SGB meaningfully engage to find an amicable settlement. This cooperative approach provides an impetus for various competing interests to find a common wind on our common journey – in the end, the best interests of children are paramount. Meaningful engagement allowed these normative considerations to be played out in a manner that the parties saw fit.

[62] This brings me to the final case I would like to discuss this evening: *Hoërskool Ermelo*.[51] The dispute in question arose as a result of a high school's language policy, which stipulated Afrikaans as the only medium of instruction. I am sure you can anticipate the parallels which I intend to draw.

[63] The Ermelo area was severely under-resourced at the time, with some schools in the region having as many as sixty-two children in each classroom. Statistics obtained by the Provincial Department of Education showed that Hoërskool Ermelo had fifteen empty classrooms. The school refused to fill them because the applicants, mainly black children from the surrounding area, did not fulfil the language criteria.

[64] As a result, the Department attempted to withdraw the power of the SGB to determine its own language policy, and appointed an interim committee to fulfil this function. The SGB challenged the Department's decision.

[65] The Court found that while the Department had the power to revoke the SGB's authority to determine its language policies, it had to do so in a lawful and procedurally fair

[49] Id at para 135.
[50] *Governing Body of the Juma Musjid Primary School & Others v Essay N.O.* 2011 (8) BCLR 761 (CC).
[51] *Head of Department : Mpumalanga Department of Education v Hoërskool Ermelo* and 2010 (2) SA 415 (CC).

manner. This, it had not done. Therefore, the appointment of the interim committee was declared void.

[66] But that was not the end of the matter. Exercising its broad remedial powers, the Court directed the SGB to reconsider its language policy. What did this entail? The school had to take into account not only its own interests and that of its learners, but also those of the broader community in general. As Professor Liebenberg has persuasively demonstrated, this approach paved the way for the emphasis on meaningful engagement as a fully-fledged remedy in subsequent cases.[52]

[67] A communicative discourse enables institutional change in a legitimate, democratic manner. But communication means naught if we cannot understand or be understood.

[68] The postscript of this case is that the language policy of the school was altered so that both English and Afrikaans are now catered for.[53] This emerged from a period of intense deliberations between the SGB and the Education Department. Interviewed members of the SGB now have a good relationship with the Department's Head.[54]

[69] As you can no doubt see, there are obvious parallels between the situation at Hoërskool Ermelo and the language debate at Stellenbosch. Many of the principles enunciated in that case are instructive.

[70] This said, there are evidently substantial differences. The demographical, political and historical nuances of each institution should not be ignored. As I touched on earlier, words and language have a unique history, purpose and context. This is why participatory bubbles must be assessed within their own institutions.

[71] The new language policy adopted by this University puts multilingualism front and centre. The aim is "to make the institution inclusive and diverse, including the use of more than one language".[55] That is a laudable aspiration, and the use of modern technology to pursue this goal exhibits a creative instinct which should be encouraged.

---

[52] Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" (2016) *19 PELJ* 1 at 38.
[53] Van der Vyver "Constitutional Protection of the Right to Education" (2012) 27 *SA Public Law* 326 at 336.
[54] Serfontein "*Head of Department: Mpumalanga Department of Education v Hoërskool Ermelo*" (2013) *De Jure* 45 at 59.
[55] Stellenbosch University "Language Policy of Stellenbosch University" at 2.

[72] But the policy does not exist in a vacuum. It comes as a response, albeit indirectly, to The University of Stellenbosch (Private Act) of 1992: a piece of legislation rushed through Parliament just before the end of Apartheid. It was section 18 of that Act which entrenched Afrikaans as the University's medium of instruction. In many senses, Stellenbosch was the crown jewel of Afrikaner nationalism. Its language policy cannot be disentangled from this history.

[73] My point is that participatory bubbles are shackled to their institutions. Auspiciously, Stellenbosch has an alternative history that entrenches both participation and transformation. The role played by the Stellenbosch intellectuals Willie Esterhuyse, Willie Breytenbach and Sampie Terreblanche, in negotiating an end to Apartheid is one example of this heritage. The National Intelligence Service (NIS), one arm of the fractured state spy apparatus, contacted Professor Esterhuyse to act as their emissary in negotiations with the liberation movement. This resulted in the three academics meeting with the ANC leadership, and eventually in the so called "Consgold Negotiations", which contributed to the fall of Apartheid.[56]

[74] The coal face at which Stellenbosch finds itself at present has none of the highfalutin drama of those negotiations. Instead, the language debate implicates more ordinary themes. Language is intrinsic to education. Without language and understanding learning becomes difficult. And this implicates issues of disenfranchisement and inequality, which mark so many of our troubles.

[75] Too often, the dispute is implicitly cast as being between, on the one hand, a university metropole who have developed – over some years – a nuanced language policy through reflection and internal dialogue; and, on the other, a disparate body of students and other unknown forces who have demands that are justified, but not always clear. To borrow a helpful phrase of Mark Gervisser, the University has been divided into "stereotyped camps of barbarians on one side of the ivory gates and recalcitrant dons on the other".[57]

[76] The same can be said of the wider tension brought about by the FeesMustFall movement. Contrary to the view of some, the FeesMustFall campaign can be transformative in the sense that I have described. It absolutely demands that the decisions of government be

[56] See generally, Padayachee "Lost and found: the South African transition through a Stellenbosch lens" 27 *International Review of Applied Economics* 834.
[57] Gevisser "Velvet Fist in a Glove of Iron" *Mail and Guardian* (4 October 1996).

justified within the social context in which it governs. Our transformative constitution encourages active citizenship.

[77] Too often, the student's movement is met with either confrontational rhetoric, or empty political posturing. The need for engaged and sincere dialogue is important both because it enables student movements to cut their political teeth, and because the students' grievances are not simply unfounded. The views and demands that they convey are central to building a culture of justification in our country.

[78] We must be more proactive. We must listen carefully. We must empathise with those who raise their concerns and needs. We must be seen to really attend to those issues so that we can find a solution. No student should be left out of university because he or she does not have money to pay for education. Our constitution has raised education to the status of a "primordial" necessity. There is therefore every reason for students to raise their grievances about fees. The Constitution permits this in the interests of acquiring education.

[79] As Professor Klare explained in his lecture here last year, "In some meaningful, more than merely symbolic sense, a mobilised and engaged grass roots is another 'branch' of government".[58] It is the people exercising their power and voice in the purest form. Our children should be applauded for their input.

[80] But FeesMustFall is not necessarily transformative. That depends on how we, the rest of society, respond. Do we listen, engage, adapt?

[81] It is here that I argue meaningful participation and transformative process intersect. When students demand a shift in language policy, or in education policy generally, it can only be truly transformative if we allow meaningful engagement to ensue. If we listen to the plurality of voices and attempt to do justice to them, even if the process is difficult or seemingly insurmountable, we are taking part in transformation.

[82] More often than not, we err when we confront civil disaffection without hearing those who cry. Mores the pity that we listen only when there is destruction of property and acts of criminality. As a country meaningful participation means that we should be proactive, and identify issues that we should engage with. When it comes to education, we should be

[58] Klare "Self Realisation, Human Rights, and Seperation of Powers: A Democracy Seeking Approach" (University of Stellenbosch Tenth Annual Human Rights Lecture, 20 August 2015) at 456.

especially vigilant. It is critical that our young people are empowered to unfurl their sails in order to be able to unleash their best potential.

[83] We are currently witnessing a wave of protests by university students country wide. The students demand free education now, not in the near future. This demand must be taken seriously. When seen in the context of our Constitution, education is the lifeblood of democracy. The quality of life of our children can only be enriched through an environment that permits all students to be educated. No student should be refused admission to a university for financial reasons. We will not be freeing the potential of each student, which our Constitution promises, if the current situation is not swiftly tackled.

[84] How do we resolve the impasse that has emerged? The answer is not a simple one. But it must be found through meaningful participation. All concerned must partake in the necessary dialogue with an intention to find lasting solutions, not solutions that may be a problem tomorrow. We must have a fervent determination to reach a resolution to the satisfaction of all stakeholders.

[85] In my opinion, this means that the Department of Higher Education must not take the firm view that it is not prepared to listen to the concerns of students unless those who *can* afford to pay are excluded from the discussion. By the same token, universities must not only be concerned about the percentage fee increase. Equally, students must be willing to take the practical concerns of management and the Department seriously.

[86] In short, what is required is an open mind and a commitment to one another. As I have already said, our Constitution abhors an ethic of obedience, and is resistant to a culture of docility. We must work vigorously for a lasting solution.

[87] At no point can we pass the buck, or wash our hands of the issues. Meaningful participation as transformative process demands that we engage one another. The emphasis, once again, is on the relational "as".

[88] To give effect to this "as", to occupy this space, we return to the start – we must do as Derrida encouraged. To "hear, read, interpret … to try to understand".[59] Only then do we do justice felt in the others' presence and accept the call to arms against entrenched dominance, to democratically shape our own accepted values, paradigms and institutions as a society.

[89] Finally, we may speak the same language.

Justice Sisi Khampepe

[59] Id at n 1 above at 20.